

# BROWN RAYSMAN

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January 19, 2006

**VIA E-FILING  
AND FEDERAL EXPRESS**

Honorable Magistrate Judge Judith Dein  
United States District Court  
District of Massachusetts  
One Courthouse Way  
Boston, Massachusetts 02210

Re: *Tricore, Inc. v. Safeco Insurance Company of America and  
R.P. Iannuccillo & Sons Construction Co.*  
C.A. No.: 04-12393(JGD)

Dear Judge Dein:

The undersigned represents the interests of Safeco Insurance Company of America ("Safeco") regarding the above-captioned matter. We are in receipt of a letter from Attorney David M. Campbell, counsel for R.P. Iannuccillo & Sons Construction Co. ("RPI") addressed to Your Honor. In the letter, Attorney Campbell seeks to have the hearing on Safeco's Motion for Partial Summary Judgment (the "Summary Judgment Motion") continued until Your Honor rules upon a certain Motion to Amend Cross-claim (the "Motion to Amend") that RPI purportedly intends to file in this matter.<sup>1</sup> For the reasons more fully set forth below, Safeco respectfully objects to RPI's eleventh hour attempt to forestall Your Honor's adjudication of the Summary Judgment Motion.

In the first instance, RPI should not be allowed to delay the hearing on the Summary Judgment Motion based on its presumptive belief that the Motion to Amend will be granted by Your Honor. The Motion to Amend is not proper. RPI has not complied with the requirements of Local Rule 7.1(a)(2) of the Local Rules of the United States District Court for the District of Massachusetts (the "Local Rules") insofar as it has failed to confer with Safeco to resolve or narrow the issues which will be the subject matter of the Motion to Amend. More important, Safeco will be highly prejudiced if the Motion to

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<sup>1</sup> Although the January 18, 2006 letter to Your Honor states that the Motion was enclosed, we did not receive the Motion. Likewise, the Motion did not appear on the Court's docket as of that date.

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Amend is granted. The fact witness discovery deadline has passed pursuant to Your Honor's May 3, 2005 Scheduling Order and every other claim in this multi-party litigation involving direct claims, counterclaims, and cross-claims has been resolved as a result of the July 19, 2005 settlement conference before Magistrate Judge Swartwood.

Indeed, the sole remaining issue in this litigation—based upon the most liberal reading of RPI's Cross-claim—is RPI's Chapter 93A Claim against Safeco, which is based upon Safeco's decision to deny RPI's disputed claim under Tricore, Inc.'s payment bond. This issue is the subject of the Summary Judgment Motion. This issue has been fully briefed by RPI and Safeco and is ready for adjudication by Your Honor.

Assuming, arguendo, that RPI's Motion to Amend is proper, the adjudication of the Motion for Summary Judgment should not be delayed in any event. Pursuant to Rule 56(b) of the Federal Rules of Civil Procedure (the "Federal Rules"), a party against whom a cross-claim is asserted may, at any time, move for a summary judgment in the party's favor as to all or any part of the cross-claim. Given the plain language of Rule 56, the adjudication of the Motion for Summary Judgment should not be delayed simply because RPI *allegedly* may have additional cross-claims against Safeco. This is especially true given that the Cross-claim subject to summary disposition has been pending since January 11, 2005 and fact witness discovery ended on December 15, 2005.<sup>1</sup>

Accordingly, Safeco respectfully objects to RPI's attempts to forestall the hearing on the Summary Judgment Motion or the adjudication of the Motion. Safeco respectfully reserves its right to fully brief the bases for its objections to the Motion to Amend in accordance with the Federal Rules and Local Rules.

Should Your Honor have any questions or concerns regarding this matter please contact me at (860) 275-6424.

Respectfully Submitted,



Dennis C. Cavanaugh

DCC/pmb

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<sup>1</sup> Although RPI filed an Amended Answer on or about May 9, 2005, the essential elements of its Cross-claim against Safeco remained unchanged.

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cc:

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